

1 of plea on September 22, 2003. At the change of plea hearing on September 22, 2003, the
2 attorney appearing for Petitioner stated his appearance as “Mark DuBose appearing for
3 Anthony Solare from San Diego on behalf of Mr. Perez , your Honor.” The transcript of the
4 record of the change of plea hearing indicates the change of plea was trailed until Petitioner
5 signed the plea agreement, whereupon the case was called and Mr. DuBose again stated his
6 appearance and Petitioner entered a plea of guilty.

7 Similarly, on December 22, 2003, the attorney appearing for Petitioner at his
8 sentencing hearing stated his appearance as “Mark DuBose appearing for Anthony Solare on
9 behalf of Mr. Jorge Perez-Serrano, who is present before the court.” The record reflects Mr.
10 DuBose was familiar with Petitioner’s case and was able to present arguments for downward
11 departure on the basis of minor role in the enterprise and alleged errors in the criminal history
12 calculation. There is nothing in the transcripts of either the change of plea or sentencing
13 hearings that indicates Petitioner’s attorney provided deficient representation or that
14 Petitioner objected in any way to Mr. DuBose’s performance, nor does Petitioner claim that
15 Mr. DuBose’s performance was in any way sub-standard.

16 The court generally agrees with the factual background Petitioner provides reflecting
17 which attorneys represented Petitioner at specific points in his case. Petitioner makes two
18 additional factual allegations that are critical to his claim for habeas relief. First, Petitioner
19 claims that Mark DuBose has not been admitted to practice before this court; that is, before
20 the District Court of the Eastern District of California. Second, Petitioner claims the name
21 “Mark DuBose” does not appear in the list of attorneys licenced to practice law in the state of
22 California. From this, Petitioner alleges Mark DuBose is not an attorney licensed to practice
23 in California.

24 The core of Petitioner’s legal argument is the contention that, if his attorney was not
25 authorized to practice before the federal court, or if his attorney was not licensed to practice
26 in California at the time he represented Petitioner, then Petitioner suffered ineffective
27

1 assistance of counsel and the ineffective assistance is presumed to be prejudicial. In other
2 words, Petitioner contends he suffered a *per se* violation of his Sixth Amendment right to
3 counsel because his attorney was not admitted to the bar of this court and/or was not admitted
4 to the California state bar.

5 Normally, an appellant or petitioner raising a claim of ineffective assistance of
6 counsel “bears the heavy burden of establishing that his ‘counsel’s representation fell below
7 an objective standard of reasonableness’ and that ‘but for counsel’s unprofessional errors, the
8 result of the proceeding would have been different.’” Bellamy v. Cogdell, 974 F.2d 302,
9 306(2nd Cir. 1992) (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)). Courts
10 have, under limited circumstances, presumed prejudice – and therefore a Sixth Amendment
11 violation – where the nature of the deprivation was such that the rule requiring demonstration
12 of prejudice in some specific fashion would not be susceptible to intelligent, evenhanded
13 application because the record would be unlikely to reflect the deprivation. Such
14 circumstances include the failure to provide any counsel or where the counsel is prevented
15 from discharging his normal functions. See Cooper v. Fitzharris, 586 F.2d 1325, 1332 (9th
16 Cir. 1978) (discussing examples of deprivation of counsel based on failure to provide or
17 prevention from discharging normal functions).

18 The Ninth Circuit has held that the guarantee of a right to counsel means a guarantee
19 of a right to representation “by an attorney admitted to practice law.” United States v.
20 Hoffman, 733 F.2d 596, 599 (9th Cir. 1984). The Ninth Circuit has also recognized that the
21 *per se* rule has been applied to the situation where a defendant has been represented by a
22 person posing as a lawyer, but who has never been admitted to the membership of any bar.
23 Id. at 599-600; United States v. Mouzin, 785 F.2d 682, 697 (9th Cir. 1986). However, the
24 scope of application of the *per se* rule in the context of provision of representation by persons
25 who are not members of any bar has been very narrow in Ninth Circuit cases. The Ninth
26 Circuit has made it clear that the *per se* rule does not apply where counsel is provided by a
27
28

1 person who is a member of a state bar, but who is disbarred by the bar association of that
2 state. See, e.g., Hoffman, 733 F.2d at 601 (court refuses to apply *per se* rule where attorney
3 representing defendant was disbarred in his home state of Florida but did not report that fact
4 to the district court in Arizona); United States v. Ross, 338 F.3d 1054, 1056 (one-time
5 admission of attorney to a state bar was “enough to overcome a claim of status-based *per se*
6 ineffective assistance”). Of particular pertinence to Petitioner’s argument, the Ross court
7 held that admission to practice in a federal court “is based on state bar membership, not an
8 independent evaluation of competency. ““It is inconceivable that the failure to take this purely
9 formal step [could cause] any prejudice to [an] appellant.”” [Citations.]” Id.

10 Petitioner contends he is entitled to the presumption of prejudice in his sixth
11 amendment claim because the attorney representing Petitioner during the change of plea
12 hearing and at the sentencing hearing was not admitted to practice before this court and
13 because his name did not appear among the members of the California State Bar. Based on
14 the foregoing discussion, the court rejects Petitioner’s first claim. The court will not presume
15 Petitioner suffered ineffective assistance because his attorney was not admitted to practice
16 before this court.

17 As to Petitioner’s second claim, the court lacks the facts necessary to make a
18 determination. Petitioner admits the name of a Marcus Edward DeBose does appear on the
19 list of members in good standing of the California Bar (SBN 216328), and that the listed
20 address of Marcus E. DuBose is the same as the listed address of Solare & Associates, the
21 firm of Petitioner’s attorney of record. The court will not assume at this point that Mark
22 DuBose and Marcus Edward DuBose are different people and will not assume for purposes
23 of this motion that Mark DuBose is not a member in good standing of the state bar. Rather,
24 the court will order that Mark DuBose submit a declaration stating his full name and State
25 Bar Number, whether he was the individual who represented Petitioner at the times in
26 question, and the status of his bar membership, if any, at the time in question. Upon
27
28

1 submission of a proper declaration, the court will decide Petitioner's motion for habeas relief
2 in accordance with the foregoing discussion.

3
4 THEREFORE, it is hereby ordered that:

- 5 1. Marcus Edward DuBose shall complete a declaration stating his full name, address,
6 State Bar Number, if any, and his state bar membership status as of September 22,
7 2003, and December 22, 2003. Marcus Edward DuBose shall also state whether he
8 complied, as of the foregoing dates, with the requirements of Local Rule 83-180
9 regarding admission to the bar of this court. Marcus Edward DuBose shall also state
10 whether he was the person who represented Petitioner at his change of plea hearing
11 and at his sentencing hearing on September 22, 2003, and December 22, 2003,
12 respectively.
- 13 2. The clerk of the court shall serve this order on the parties and on Marcus Edward
14 DuBose at 402 West Broadway, Suite 2150, San Diego, California 92101.
- 15 3. Markus Edward DuBose shall file and serve the declaration not later than fourteen
16 (14) days from the date of service of this order.
- 17 4. Petitioner and the United States shall not respond to this order unless directed to do so
18 by this court.

19
20 IT IS SO ORDERED.

21 **Dated: December 20, 2005**
22 h2ehf

/s/ Anthony W. Ishii
UNITED STATES DISTRICT JUDGE